perty Ordinance (Cap. 118). This section reads as follows:—

> "75. (1) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

This section is very wide, and applies whether or not the purchaser has notice of any defect. In my opinion this section would protect the purchaser even if subsequently an application should be made to set aside the order of the 1st April 1938 for want of parties.

In the result the purchaser's objection fails. The costs agreed at $30/- must be paid by the defendant to the plaintiff.

Judgment accordingly.

Solicitors for the plaintiff—*Chan & Eber.*

Solicitors for the defendent—*Aditan & Co.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

May 18, 1938.

IN RE LIM YEW TEOK, deceased

CHAN MEK TUAN v. LIM GEOK CHIP AND TWO OTHERS.

[SINGAPORE SUIT No. 500 of 1936].

Defaulting trustees—recovery by new trustees from shares of defaulting beneficiary—trustees of amounts due—apportionment between capital and income—position of foreclosed property and allocation of income.

A trustee who is indebted to the estate must be taken to have paid himself all that he can claim out of the moneys which had come into his hands and for which he has not accounted. Subsequent new trustees are entitled to retain the beneficial interest of such defaulting trustee until his default is made good. But this does not cause the interest of such defaulting trustee to become "vested in or payable to some other person" for the purpose of a forfeiture clause.

When there have been defalcations in respect of both capital and income and when sums are afterwards received to account of such defalcations, the amounts so received must be adjusted between capital and income and the manner in which adjustment should be made must necessarily vary according to the circumstances of the particular case. A court of equity should effect such adjustment in a manner that is reasonable and will so far as possible do justice between the tenant for life and the remaindermen. In this case the amounts recovered or to be recovered by the new trustees from or on account of the defaulting trustee from any source were directed to be allotted proportionately to capital and income according to the amounts of the defalcations of capital and income as found by the Registrar.

Held, also that when one of the trust securities is a mortgage which has been foreclosed the foreclosed property should be treated for the time being as a proper investment of the trust estate and the tenants for life should be entitled to the income therefrom. The arrears of mortgage interest prior to foreclosure having already been ascertained in the foreclosure proceedings, if before the period of distribution any of such foreclosed properties are sold under Order of Court then the amount realised can be apportioned between the tenants for life and the remaindermen on the same principle as would apply in cases where a mortgaged property is realised.

SUMMONS IN CHAMBERS.

Munro, for the applicants present trustees.

Vaux, for Lim Ah Kow appointed to represent certain classes of beneficiaries.

K. C. H. Lim, for Mr. C. F. J. Ess, Deputy Registrar, Supreme Court, Singapore, representing all persons interested in case the cesser clause should apply.

Green, for Mr. S. H. Cheah, Deputy Registrar, Supreme Court, Singapore, representing the remaindermen.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, J.—The first question that arises is whether the present trustees can retain the share of income payable to the defendants, the defaulting trustees, until the deficit in capital and income debitable to the defaulting trustees is made up. If the answer to the question is in the affirmative, the further question arises as to whether the forfeiture clause (Clause 7 of the Will) takes effect.

As regards the right of retainer the principle is well established that a defaulting trustee cannot receive his share in the trust estate until his indebtedness to the trust estate is satisfied. The theory on which the rule is based is clearly stated by Jessel, M. R. in *Jacobs* v. *Rylance* 17 Eq. 342. "In the view of this Court the trustee who is indebted to the estate.....must be taken to have paid himself all that he can claim out of the moneys which have come into his hands, and for which he has not accounted. This is not the case of impounding a trust fund. The trustee has already had all that he can claim and has paid himself." (See also *Doering* v. *Doering* 42 Ch. D. 203).

The only question therefore that need cause any difficulty is whether the forfeiture clause applies. Clause 7 of the Will reads as follows:—

> "I DECLARE that if any person who is or may become a legatee or beneficiary under this my Will shall commit, permit or suffer any act default or process whereby his or her interest or any part thereof would but for this present provision become vested in or payable to any other person or persons then such interest in so far as it is then unpaid or unsatisfied shall absolutely cease and determine as if such person were dead and in such case I DIRECT my trustees to hold such share UPON TRUST to pay or apply the income thereof or so much

thereof as my Trustees in their uncontrolled discretion shall think fit unto and for the maintenance or for the benefit of the person who has forfeited his share or her share his wife (or her husband as the case may be) and issue and shall hold so much of such income as they shall not pay or apply in the exercise of the discretionary trust or power aforesaid UPON THE LIKE TRUST as if the said persons were dead."

The clause is obscurely worded, and it is argued that the forfeiture clause only applies to a disposition of the contingent interest of any beneficiary in the capital. I do not think that I need consider this argument because, in my opinion, the interest of the defendants has not become "vested in or payable to" anyone else. The present trustees are only retaining what in equity the defendants are deemed already to have received. Accordingly until their default is rectified, it is not correct to say that the defendants' share has become "vested in or payable to some other person," as would be the case if the interest were claimed by the Official Assignee, or by a judgment creditor or assignee.

On the first question therefore I find that the trustees are entitled to retain the beneficial interest of the defendants in the trust estate during their respective lives, or until the default is made good. No question arises as to any contingent interest of the defendants in the residue, as the residuary legatees can only be ascertained at the date of distribution. This date is 21 years from the death of the testator's last surviving child. As all the defendants are sons of the testator it follows that none of them can under any circumstances be residuary legatees.

The next question that arises is as to how the moneys recovered or to be recovered from the defaulting trustees should be apportioned between capital and income. I am informed that the capital defalcations amount to over $200,000 and that the defalcations in respect of income, which are the subject of an inquiry before the Court, will also amount to a substantial sum.

The sources of the recoupment will be twofold, (a) by seizing in execution after judgment the property of the defendants, if any, in the jurisdiction, and (b) by retaining the shares of the defendants as beneficiaries in the estate during such period as such shares would, but for such default, have been payable to them, that is to say, for the term of their respective lives. I do not think that the source of the recoupment should make any difference to the manner in which the money recovered should be apportioned, and that all such sums should be dealt with according to the same principle.

In all cases where the loss has arisen from a breach of trust the general principle is that laid down by James, V.C. in *Cox* v. *Cox*, 8 Eq. 343 at p. 344. "The true principle in all these cases is that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when the first became entitled in possession to the fund."

The passage is quoted with approval by Farwell, J. in *In re Bird*, (1901) 1 Ch. 919 which was also a case of a breach of trust. But the actual method by which the apportionment was carried out was by no means the same. In *Cox* v. *Cox* a sum of £6,000 had been covenanted to be paid. The obligor died on the 14th July 1862 without having paid the sum in question. Ultimately a sum of about £5,500 was recovered on the 6th June 1868 at which period there were arrears of interest amounting to over £1,600. It was ordered that a calculation should be made as to what sum invested at 4% at the date of the testator's death would have amounted to £5,500 at the date when such sum was recovered. Such sum was to be treated as capital and the balance as income.

In *In re Bird* the facts were quite different. The trustee had improperly sold out a sum of about £10,000 in consols and invested it on a mortgage of his own property. A sum of over £4,000 had been received as interest on the unauthorised investment, but, when the security was realised, there was a considerable deficiency in the capital sum, the sum realized being paid into Court. Farwell, J. directed that a calculation should be made of the actual dividends on the consols that ought to have been received, and the value of the consols at the date of the tenant for life's death, when the fund was distributable. These two should be added together, and it should have been ascertained what proportion the dividends which should have been received, bore to such aggregate sum. The tenant for life was then to be entitled to that proportion of the aggregate sum made up of the fund in Court and the dividends actually received, but giving credit for such dividends, though not liable to make any refund in case of over payment.

The conclusion I draw from these two cases is that although the principle is not in dispute, the manner in which the adjustment should be made must necessarily vary according to the circumstances of the particular case, and that a Court of Equity should effect such adjustment in a manner that is reasonable, and will so far as possible do justice between the tenant for life and the remaindermen.

On behalf of the remaindermen I was referred to the case of *In re Grabowski's Settlement*, 6 Eq. 12. In that case the trustee had committed defalcations both of capital and income and after his death the new trustees

recovered against his estate a sum which was less than the capital moneys lost. Lord Romilly, M.R. held that the whole of the sum recovered must be treated as capital, and that the tenant for life was only entitled to the interest on the sum recovered.

This was cited to me on a previous hearing of this same originating summons with respect to a sum of $19,000 which was discovered in the estate banking account after the defaulting trustees had absconded. On that ocaasion Mr. Green for the remaindermen based his argument on this case, and counsel for the life tenants, Messrs. Zehnder and Cobbett did not dispute its applicability. On the present hearing Mr. Vaux, who was appointed to represent the life tenants, submitted that *In re Grabowski's Settlement* had been overruled, and it has accordingly been necessary for me to consider carefully the authority of this case. As regards the text books, the case is only referred to in *Lewin* on Trusts, 10th ed. 966, where the author states that the case has in effect been overruled by *Cox* v. *Cox*. The case is not referred to at all in *Underhill*, *Godefroi*, or *Halsbury*. As regards the authorities in *Cox* v. *Cox* as reported in the Law Journal, (38 L.J. Eq. 569) James, V.C. said " that it was clear there must be an apportionment, the only question was as to the principle upon which it was to be made. There must have been some slip in *In re Grabowski's Settlement*." The only other reference to this case which I have found is *In re the Earl of Chesterfield's Trusts*, 24 Ch. D. 652. According to the report, Chitty, J. referred to *In re Grabowski's Settlement*, whereupon counsel submitted that *Beavan* v. *Beavan*, 24 Ch. D. 649 laid down a more correct principle, and in giving judgment Chitty, J. said " It appears to me that *Beavan* v. *Beavan* adopts the right principle and I therefore follow it in the present case."

In the result I am satisfied that *In re Grabowski's Settlement* is not good law and should not be followed. As regards my decision in the present originating summons on the 27th July 1937, it may be that the order directing that the $19,000 be treated as capital may be supported on the ground that moneys in the trustees' banking account may, in the absence of any evidence, be properly treated as uninvested capital moneys, but I do not consider that it was correct to base my decision on *In re Grabowski's Settlement*, and I do not propose to follow that decision in the present case.

Now, as regards the principle upon which the apportionment should be made, I think that the amount recovered should be apportioned between the tenant for life and the remaindermen on the same principle as when there is a deficiency on the realisation of a mortgage, such mortgage having been an authorised investment. The principle is clearly laid down in *In re Atkinson*, (1904) 2 Ch. 160 which is a Court of Appeal decision and has been followed in many cases, and is to the effect that the amount recovered should be divided between the tenant for life and the remaindermen in the proportion which the amount due for arrears of interest bears to the amount due in respect of the capital debt. In the course of his judgment in that case Romer, L.J., (*Ibid* at p. 167) refers to the cases of *Cox* v. *Cox* and *In re Bird* and says that these are cases of unauthorized investments and had no application to the case with which he was dealing. He proceeds: " In dealing with cases of unauthorized investments from the very nature of the transaction one has to consider the rights of the parties at the time when the investment was made." But the methods adopted in the case of unauthorized investments cannot readily be applied where the breach of trust is a *devastavit*. In the present case the theft of the trust funds has occurred at different times, which, owing to the absence of accounts and the disappearance of the parties, can now never be ascertained, and it is obvious that the exact methods of computation directed by the Court in *Cox* v. *Cox* and *In re Bird* are unsuitable, and some more practical method of apportionment must be adopted. I rule therefore that the amounts to be recovered by the present trustees from or on account of the defendants from any source be allotted proportionately to capital and income according to the amounts of the defalcations of capital and income as found by the Registrar. The tenants for life will be entitled to the income derivable from the investments of any capital sums recovered.

As regards paragraph 2(b) of the summons, the amounts recovered will be apportioned upon the principle laid down in *In re Atkinson*, (*supra*). As I am informed that it is impossible to discover whether the mortgage investments of the former trustees were or were not authorized, it will avoid complications to treat them as all being authorized investments.

As regards paragraph 7, the question as to what should be done in the case of foreclosure presents certain difficulties. Mr. Vaux relied on the case of *In re Horn*, (1924) 2 Ch. 222. This case is of doubtful authority, as the question which arose was whether under s. 9, sub-s. 2 of the Conveyancing Act 1911 the tenants for life were entitled to receive the whole of the rents of certain properties which were formerly vested in the trustees by way of security, but which had been foreclosed. This section is not law in this Colony, and it therefore falls upon me to decide this question on general principles. I direct that the foreclosed properties be treated for the time being as proper investments of the trust estate, and that the tenants for life be entitled to the income therefrom. The arrears of mortgage interest prior to foreclosure have already been ascertained in the foreclosure proceedings, and if before the period of distribution any of such

properties are sold under Order of Court, then the amount realised can be apportioned between the tenants for life and the remaindermen on the same principle as would apply in cases where mortgaged property is realised. The Order in *In re Horn's Estate*, (*Ibid* at p. 229) can be adapted, but the word 'and' must be added after the date 17th December 1915, in the 13th line of p. 229, such word having been accidentally omitted from the report.

Order accordingly.

Solicitors for the applicants—
Allen & Gledhill.

Solicitors for Lim Ah Kow—
Rodyk & Davidson.

Solicitor for Mr. C. F. J. Ess—
R. C. H. Lim.

Solicitors for Mr. S. H. Cheah—
John G. Campbell & Co.

[COURT OF CRIMINAL APPEAL]
McELWAINE, C.J., TERRELL & HORNE, JJ.
June 3, 1938.

CHIA CHAN BAH alias CHIAH AH SAN
vs.
THE KING

[CRIMINAL APPEAL No. 15 of 1938]

Criminal law—murder—Defence of Insanity —onus—degree of proof—section 106 of The Evidence Ordinance.

In a trial for murder it is incumbent on the Crown to prove beyond reasonable doubt that the accused killed the deceased by an act which constitutes murder within the meaning of section 300 of the Penal Code. Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106 of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubt whether he really was insane.

Rex v. *Sodeman* (1936) 2 All E. R. 1138 and *Lim Tong* v. *The Public Prosecutor*, (1938) 7 M.L.J. 41 referred to.

The appellant was convicted at the Penang Assizes held on the 17th February 1938 of the murder of one Uni Tee Wan alias Lap Pheng on 14th July 1937 and was sentenced to death. The defence was that the accused was insane at the time of the killing. The accused appealed.

Held, that the plea of insanity failed inasmuch as there was nothing in the evidence to suggest that the appellant was probably of unsound mind on the day of the commission of murder or to discharge the mild burden of proof prescribed in *Sodeman's Case* much less probable that on the day of the crime the appellant was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

CRIMINAL APPEAL.

de Mello, for the Appellant.

Howe, Crown Counsel, for the Crown.

The judgment of the Court of Criminal Appeal, consisting of McELWAINE, C.J., TERRELL & HORNE, JJ. was as follows:

The appellant was convicted on the 17th day of February 1938 at Penang Assizes of the offence of murder and was sentenced to death. He was late in lodging his appeal and the Court had no power to enlarge the time for appealing, but the Governor-in-Council referred the whole case to the Court of Criminal Appeal under section 21 of the Court of Criminal Appeal Ordinance (Chapter 11).

At the trial the accused did not give evidence. When asked the usual question as to whether he wished to give evidence on oath or to make an unsworn statement from the dock, or to say nothing, he replied, "I have nothing to say, My Lord." He called no evidence.

It was proved that on the 14th July 1937 the appellant killed Uni Tee Wan alias Lap Pheng under circumstances that would clearly amount to murder unless the accused was shewn to be insane at the time of the killing. The only defence was that the accused was insane.

The appeal is against the failure of the Jury to find that the accused was insane on 14th July when he committed the act and he founded his appeal on alleged misreception of evidence and on misdirection, particulars of which were given in the appellant's petition to the Governor-in-Council to remit the case to this Court.

The evidence which is complained of was

(1) evidence of the appellant's conviction in 1935 for the possession of an unlicensed revolver

(2) evidence that the deceased was the person who gave the information which led to the conviction.

This evidence was admitted to prove motive for the killing, and to prove such motive it was necessary to prove that the appellant knew who the informer was. There was some evidence from which it might possibly have been inferred that the appellant did know that the deceased was the informer but it is unnecessary to deal with this as the appellant made a confession to a magistrate which was in evidence. In this confession the appellant commenced by stating that in 1935 the deceased planted a revolver on him in consequence of which he was arrested, convicted, and sentenced to one year rigorous imprisonment and eighteen months Police supervision. He also stated that on 12th July 1937 a friend Neo Poon Tee had told him (appellant) that deceased had been teasing his (Neo Poon Tee's) wife and had put him (appellant) into trouble, and asked him (appellant) to stab deceased to death, and that Neo Poon Tee would help him to get away by paying his expenses to Siam or China.